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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Service	)	
Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	

To: The Commission

COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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Dated: March 18, 1996

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INTRODUCTION

The Independent Cable & Telecommunications Association ("ICTA") submits these comments in response to the Notice of Proposed Rulemaking (the "Notice") in the above-referenced proceeding.[1]

ICTA represents a cross-section of companies on the cutting-edge of the telecommunications revolution leading the U.S. into the twenty-first century. Its members include private cable operators (referred to also as satellite master antenna television), shared tenant services providers, equipment manufacturers, program distributors, and property management development companies. While ICTA operator members originally concentrated their competitive entry efforts within the video services marketplace, the last five years in particular have marked a tremendous expansion into the provision of voice and data communications services to consumers throughout the country. ICTA operator

[1] ICTA is the successor organization to the National Private Cable Association.

members employ a variety of telecommunications technologies, both wired and wireless, to serve primarily the residential multiple dwelling unit ("MDU") market. Thus, ICTA members primarily compete with both franchised cable operators, the dominant player in the local multichannel video programming distribution market, and incumbent local exchange carriers ("LECs"), the dominant player on the local telephone market. Without the competition fostered by ICTA members, and other emerging technology companies, MDU owners and managers, as well as tenants, would have little choice among cable and telecommunications providers.

The issues raised in the Notice are of critical importance to ICTA. As the technological and regulatory barriers between these two previously distinct cable and telecommunications markets fall, the Commission is confronted with the difficult task of establishing a regulatory framework that will allow incumbent LECs and franchised cable operators to compete with each other, while simultaneously promoting full competition from other sources such as that posed by ICTA's members. The Notice is an important step toward the development of this new regulatory scheme. The Commission's conclusions will, in large part, determine whether the future "converged" telecommunications market is characterized by vigorous competition among multiple service providers or by a duopoly of the dominant LEC and the dominant franchised cable operator.

SUMMARY OF COMMENTS

It has been the experience of ICTA's members that the current cable demarcation point for MDUs is unworkable and impractical because a purchaser is not able to purchase all of the inside wiring that is needed to provide service to the rental units as a whole. Property owners who want to switch or add providers are faced with the Hobson's choice of defending a lawsuit brought by the cable operator, which claims that it owns the inside wiring, or incurring the cost, impairment, risk, disruption and inconvenience associated with adding another set of wires throughout the building. To resolve this impasse, ICTA recommends moving the demarcation point back to where the wire is dedicated to an individual rental unit, and permitting the property owner to purchase the wiring upon termination. Such a regulation will ensure that the objectives behind section 16(d) of the Consumer Protection and Competition Act of 1992 ("Section 16(d)") are met as property owners would avoid incurring damage to their property by the cable operator's removal of inside wiring, and avoid the cost and inconvenience of having new inside wiring installed. Moreover, this modification will also promote competition since the decision of which provider(s) to select will be based upon factors that are important to tenants, such as price and quality of service, instead of factors that are unimportant to tenants, such as the property owner's desire to avoid a lawsuit.

If the Commission extends the demarcation point, ICTA believes that the property owner should be afforded the option to purchase the wiring upon termination instead of the tenant. ICTA respectfully submits that the Commission does not have the statutory authority to do otherwise because under Section 16(d), Congress has only authorized the Commission to prescribe rules concerning the disposition of cable "within the subscriber's premises." Even if the subscriber under Section 16(d) is the tenant (and not the property owner as ICTA maintains), wiring placed throughout the common areas is not part of the tenant's actual premises.

Moreover, the Supreme Court has established that the forced retention or installation of wiring within an MDU by a cable operator is a taking of the property owner's property under the Fifth Amendment. Thus, regulations authorizing a tenant to retain control and/or ownership over the wiring in the common areas is no less a taking, as the Third Circuit recognized when it found that the tenant does not have a common law right to insist upon retaining or installing cable wire in the common areas. Yet, Congress has not given the Commission the eminent domain power to exact such a taking under Section 16(d).

ICTA believes, however, that the Commission does possess the power to permit property owners of MDUs to purchase the wiring in the common areas, which is obviously within their premises. ICTA maintains that property owners of MDUs should be considered the "subscriber" under Section 16(d) because the legislative history establishes that Section 16(d) was enacted primarily to protect the concerns and interests of property owners. Because of the takings concerns, refusing to permit property owners to purchase the wiring would most likely result in an inability to move the cable demarcation point, thus undermining the objectives of Section 16(d).

Should the Commission decide to keep the current cable demarcation point, ICTA urges the Commission to include a provision requiring cable operators to elect within seven business days after notice by a property owner of the effective date of termination whether to remove that portion of the wiring running from the junction box to the rental unit. Given that this wiring costs more to remove than it is worth, cable operators often will decide not to remove the wiring and therefore Congress's objectives under Section 16(d) will be met in most cases.

ICTA does not support a mandated right of access to private property. Congress itself twice considered enacting mandatory access laws, but rejected such provisions, preferring deregulatory marketplace controls. In light of this, ICTA believes that the Commission has not been granted the eminent domain power to exact such a taking. In any event, and equally important, such laws do not promote competition or tenant welfare. In the competitive MDU marketplace, property owners and associations seek to use the leverage that they have from representing a large customer base to ensure by contract that their tenants receive competitive rates, responsive customer service standards and programming content tailored to the demographics of the building. Given the drastic variance throughout the country of the demographics of MDU communities, the decision as to whether single, dual or multiple access will better bring the "information superhighway" to residents should be left to a highly deregulated marketplace. If the marketplace is permitted to operate free of antisocial restraints on contracting power, each services provider will be confronted on a regular basis with the possibility that an alternative supplier might be chosen and thus will strive for service similar excellence. Mandatory access laws preclude the exercise of the traditional marketplace remedy for inferior service -- exclusion from the building and renegotiation in the marketplace for a substitute provider.

The fact that in some instances a property owner or association may not wish to grant access to more than one provider or that a particular competitor may require exclusivity at a particular MDU should not be viewed in a negative light. Exclusivity is often the key to unlocking supracompetitive offerings and is often necessary to attract and justify investment for ICTA members who must usually install a complete stand-alone cable system per property. The presence of an additional provider can render it economically infeasible to provide service since the available subscriber base at an MDU may, if shared, be insufficient to achieve a proper return or investment.

ICTA strongly believes that to help achieve access parity, the Commission should preempt state and local access laws that discriminate in favor of the franchised cable operator by forcing property owners or associations to grant only franchised operators access to their private property for the provision of cable services. The Commission should preempt such discriminatory laws because they unfairly advantage the franchised operator, provide no benefit to the public and discourage competition to such an extent that competitors often do not even attempt to compete significantly in those states. Preemption would constitute a reasonable accommodation of conflicting policies given that as a result of the 1992 and 1996 Acts, Congress has mandated that the Commission take numerous steps toward fostering the growth of competition in the cable industry and has established a federal policy against favoritism toward any telecommunications providers.

ICTA also recommends that the Commission preclude contracts specifying a duration for the length of the franchise and all renewals or extensions because these "perpetual contracts" deter and often prevent alternative providers from ever competing to serve the property. Moreover, property owners often enter into such contracts unaware that they are "perpetual contracts." The Commission should adopt regulations ensuring that all future service agreements include a durational provision of a specific term of years. Existing "perpetual agreements" should remain in effect only until the initial franchise term has expired, but in no event more than 15 years from the effective date of the agreement.

ICTA concurs with the Commission's tentative conclusion that the cable signal leakage standards should apply to all broadband service providers, but ICTA urges the Commission to tailor the signal leakage rules so as to be technology and service specific. ICTA further recommends that a five year transition period be established for private cable operators to bring existing systems into full compliance with the new rules.

Finally, ICTA believes that the Commission should not change the telephone network demarcation point to mirror the current cable demarcation point, but rather should clarify that the telephone network demarcation point for all MDU buildings, both pre- and post-1990, is the minimum point of entry, and explicitly require LECs to place the demarcation point at that juncture, unless the property owner designates otherwise. The telephone demarcation rules have been largely ignored by incumbent LECs seeking to inhibit competitive access to MDUs. LECs repeatedly claim that the demarcation point is at the first jack in each individual unit. In light of this anticompetitive practice, many would-be competitors have been discouraged from entering the market, since it is too burdensome on new entrants to rewire entire MDUs in order to provide service and because challenges to same must be mounted on a state by state basis. ICTA's recommendation will enhance the growth and development of competition at the local exchange level in MDUs because it will enable alternative providers to compete for service contracts with the expectation of having practical access to the individual units in each MDU. In addition, property owners would have greater bargaining power vis-a-vis service providers if they could guarantee such access, which could be used to obtain lower cost, customized services for the residents of the MDU.

DISCUSSION

I. CABLE DEMARCATION POINT

A. ICTA Strongly Urges That The Commission Move The Cable Demarcation Point For MDUs To The Point Where The Wire Is Dedicated To An Individual Rental Unit, And Upon Termination Of The Service Provide The Property Owner With The Option To Purchase That Dedicated Wire

1. ICTA Respectfully Submits That The Commission Only Has The Authority And Power To Extend The Cable Demarcation Point For MDUs If The Commission Provides The Property Owner (Instead Of The Tenant) With The Option To Purchase The Wire After Termination Of Service

Under Section 16(d) of the 1992 Cable Act, Congress required the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." 47 U.S.C. § 544(i) (1995). The legislative history to that provision establishes that Congress wanted to "give the homeowner after [termination of service] the option to acquire the wiring" through purchase of the wire. Senate Comm. on Commerce, Science, and Transp., Cable Television Cons. Prot. and Comp. Act of 1992,

S. Rep. No. 92, 102d Cong., 2d Sess. 23 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1156 ("Legis. Hist. at 1156"). Pursuant to Section 16(d), the Commission promulgated 47 C.F.R. §76.802, which provides that upon termination of cable service a cable operator shall not remove the "cable home wiring" unless it gives the subscriber the opportunity to purchase the wiring and the subscriber declines.

The Commission has defined "cable home wiring" to be the "internal wiring contained within the premises of a subscriber which begins at the demarcation point." 47 C.F.R. § 76.5(ll). As presently interpreted, under current Commission rules the cable demarcation point for MDUs is twelve inches outside of where the cable wire enters the rental unit. 47 C.F.R. §76.5(mm)(2) (the "12 inch rule"). Therefore, under the 12 inch rule, the purchaser can only purchase the portion of the wire that is in the rental unit or is within 12 inches of the rental unit.

While ICTA believes it is imperative that the Commission move the cable demarcation point for MDUs (as shown in the following subsections), ICTA respectfully submits that the Commission does not have the statutory authority to do so unless the Commission provides the property owner (instead of the tenant) with the option to purchase the wiring. ICTA further believes that the Commission cannot move the demarcation point and provide the tenant with the option to purchase the wiring because to do so would constitute an unconstitutional taking of the property owner's property.

a. ICTA Believes That The Commission Only Has The Statutory Authority To Extend The Demarcation Point If It Provides The Property Owner (Instead Of The Tenant) With The Option To Purchase The Wiring Upon Termination

Section 16(d) authorizes the Commission to prescribe rules concerning the disposition of operator-installed cable, but only if that cable is "within the subscriber's premises." 47 U.S.C. §544(i) (emphasis added). As the legislative history establishes, "this provision shall not apply to any wiring outside of the 'home'." Legis. Hist. at 1156.

In light of the clear language of this provision and its legislative history, ICTA respectfully maintains that the Commission does not have the statutory authority to extend the demarcation point further from the rental unit if the Commission provides the tenants with the option of purchasing the cable home wiring -- that is, if the Commission construes the tenant to be the subscriber under Section 16(d) for an MDU. While ICTA believes that under Section 16(d) the rental unit itself is the "premises" of the property owner, who actually owns the unit, and not the premises of the tenant, it is clear that the common areas outside of the rental unit are solely the property owner's premises. The tenant does not own, control or live in those areas, which are both owned and controlled by the property owner. Therefore, ICTA believes that the Commission does not have the authority to extend the demarcation point further from the rental unit and yet allow the tenant the option to purchase the wiring because wiring that is outside of the tenant's rental unit is certainly not <u>within</u> the tenant's "premises" or "home."

Conversely, if the property owner is permitted to purchase the cable home wiring upon termination, the Commission does have the statutory authority to extend the demarcation point into the common areas. In light of Section 16(d), the Commission has the statutory authority to extend the demarcation point so long as the demarcation point remains within the subscriber's premises. If the property owner is deemed the subscriber for an MDU under Section 16(d) (just as it is for a single family unit "SFU"), then the Commission clearly has the necessary statutory authority to extend the demarcation point because the common areas are the premises of the property owner, who owns and controls those areas.[2]

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[2] Under the current rules for telephone, it is the property owner and not the tenant of an MDU who has access to the wiring inside the demarcation point. 47 C.F.R. §68.3(b); <u>see</u> Section V <u>infra</u>.

For at least two reasons, ICTA firmly believes that the property owner should be considered the "subscriber" under Section 16(d) with respect to MDUs.[3/] First, while the legislative history of Section 16(d) shows that Congress was primarily focusing on the single family home, the purposes behind the provision, as shown from that history, reveals that this provision was enacted primarily to protect the concerns and interests of property owners (which, are, of course, the property owners and associations in MDUs). Section 16(d) was enacted so that property owners could (i) avoid incurring damage to their property by the cable operator's removal of the wiring after termination; and (ii) avoid the cost and inconvenience of having new wiring installed when a different provider is chosen. Legis. Hist. at 1156. Damage to the MDU is primarily the concern of the property owner, who owns the building and has to repair any such damage. Similarly, the cost of having new wiring installed is ordinarily borne by the property owner, who makes the decision as to which providers will service the property and as to whether any new wiring installation will be permitted whether inside or outside of a particular tenant's unit. The inconvenience from such new installation is borne by both the property owner (whose building is once again being wired) and the tenant. The legislative history further shows that Congress wanted the Commission to prescribe rules "to permit ownership of the cable wiring by the homeowner." Id. The owner of the building is, of course, the property owner, and therefore, Congress has set forth its intent to have the property owner be deemed the subscriber under Section 16(d) for MDUs.

Second, ICTA strongly believes that even if the Commission concludes that it is unclear whether the "subscriber" under Section 16(d) should be the owner of an MDU, the Commission should construe

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3/ Congress has not defined the term "subscriber" for purposes of Section 16(d). While the Commission has defined the term for purposes of its rules, 47 C.F.R. §76.5 (ee), such definition is not binding on Congress.

the ambiguity in favor of that interpretation so that the purposes of Section 16(d) can be met. See Albertson's, Inc. v. C.I.R., 42 F.3d 537 (9th Cir. 1994) cert. denied, _____ U.S. _____, 116 S.Ct. 51 (1995) (incorrect to adopt construction of statute that directly undercuts its clear purpose, even if based on plain language); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) (statute shall be construed in light of purposes Congress sought to serve). As shown in sections I.A.2 and I.A.3 below, unless the demarcation point is moved back further from the rental unit, the purposes of Section 16(d) will not be met. Yet, ICTA respectfully maintains that the Commission cannot extend the demarcation point and give the tenant the option to purchase the wiring because it lacks the statutory authority to do so and such action would run afoul of the Fifth Amendment of the Constitution, as shown below.[4/]

b. If The Commission Extends The Cable Demarcation Point For MDUs, ICTA Strongly Believes That The Commission Cannot Give Tenants The Right to Purchase The Wire Because To Do So Would Exact An Unconstitutional Taking Of The Property Owners' Property

If the Commission extends the cable demarcation point into the common area of MDUs, ICTA respectfully submits that the Commission is constitutionally prohibited from offering the tenant the option to purchase that wiring. The Fifth Amendment to the United States Constitution forbids the taking of private property for public use without just compensation. ICTA firmly believes that to allow tenants to own and place cable wiring (and related equipment) in the common areas is a taking of the property owner's property under the Fifth Amendment. Congress has not given the Commission the eminent domain power to exact such a taking. Moreover, even if it had that power, the Commission

4/ Since the property owner should be considered the subscriber under Section 16(d), Congress has given the Commission the power of eminent domain to require that cable operators sell the wiring to property owners. Given that the cable operators will receive just compensation for the wiring under 47 C.F.R. §76.802, the taking involved here is constitutional.

has not provided for just compensation for such a taking. Therefore, ICTA believes the Commission is prohibited from mandating such a taking.

Compelling an owner of an MDU to have cable wiring and other tangible equipment associated with the provision of cable service (e.g., plates, boxes, bolts and screws) installed or retained on its property is a taking under the Fifth Amendment because it constitutes a permanent physical invasion and occupation of the property. Loretto v. Teleprompter Manhattan CATV Corp.,458 U.S. 419 (1982). In Loretto, the Supreme Court reviewed a New York statute that provided that owners of MDUs may not "interfere with the installation of cable television facilities" upon their premises. Id. at 423. The Supreme Court concluded that the statute exacted a taking of the property owner's property without just compensation in contravention of the Fifth Amendment.

The Loretto Court found that the property which was taken pursuant to the New York statute was the physical space in which the cable wire and associated equipment was installed. The Supreme Court found that there was no material difference between the facts in Loretto and St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893). Loretto, 458 U.S. at 428-29. In Western Union,148 U.S. at 99, the Supreme Court held that the placement of telegraph poles on the city's streets was a taking, reasoning as follows:

> [T]he use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground.

In concluding that a taking had occurred, the Loretto Court explicitly rejected the argument that because the wiring and equipment would only take a relatively small amount of space on the property, there was no taking:

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would

> be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.

Loretto, 458 U.S. at 436-37 (emphasis added). The Supreme Court concluded that the type of taking present in Loretto "is perhaps the most serious form of invasion of an owner's property interests." Id. at 435.

The Loretto decision establishes that if the Commission allows the tenant to purchase wiring in the common areas, then the tenant's ownership and control of that wiring in the common areas would be a taking of the property owner's property. In fact, the only difference between that scenario (the "Tenant Ownership Scenario") and Loretto is that in the former the tenant owns the wiring whereas in the latter the cable provider owns the wiring.[5/] That difference is immaterial and legally insignificant.[6/]

[5/] The fact that under the Tenant Ownership Scenario the wiring would be installed in the common areas prior to the time the tenant would obtain ownership does not distinguish that scenario from Loretto. In Loretto, 458 U.S. at 421-22, the wiring was also already on the property when the property owner challenged the retention of the wiring on its property as a taking. See also Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir) (court found that retention of cable wiring in MDU over owners' objection pursuant to governmental action was a taking), cert. denied, 113 S. Ct 182 (1992), reh'g denied, 988 F.2d 1071 (11th Cir. 1993). In any event, a property owner's initial authorization to permit the wiring to be installed under a contract for a term of years now expired or under a revocable license does not mean that it has waived its right to have the wiring removed. See, e.g., United States v. 126.24 Acres of Land, 572 F.Supp. 832 (W.D. Mo. 1983); Larson v. TriCity Elec. Service Co., 132 F.2d 693, 697 (7th Cir. 1943). Under that theory, by analogy, a single family homeowner that gives someone permission to live in the basement without ever discussing duration has waived any right to ever have that person removed from the homeowner's house. Such, of course, is not the law. Finally, under the Tenant Ownership Scenario, the initial permission to install and use the wiring was not even given to the tenant but was instead given to the cable company.

[6/] The Supreme Court in Loretto established that the permanent physical occupation of the property of another is a taking, without regard to the identity of the occupant. 458 U.S. at 433, n. 9. While the Supreme Court did not need to resolve the issue of the rights of the property owner and tenants to the common areas in Loretto, it did note that one must remember that "the government does not have unlimited power to redefine property rights." Id. at 439 n. 17.

In Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989), a cable provider sought to provide cable service (and install and retain its wiring) at an MDU complex in light of a tenant's request to receive service. The cable operator argued, among other things, that the property owner could not prevent the installation of the wiring since the common law gave the tenant the right to receive such cable service, and therefore the right to require that the MDU (including the common areas) be wired for service by the cable operator. Id. at 161. The Third Circuit summarily rejected this argument, finding that the common law did not give tenants the right to insist on having the building wired for cable. Id. The court reasoned that, notwithstanding the tenants' undisputed rights to purchase goods and services of their choice, and allow the providers of same onto the property, a tenant may not force a landlord to install tangible equipment in the landlord's common areas in order to receive such services. 867 F.2d at 161. "Permitting a tenant to insist that a landlord allow a cable company to install equipment and provide service is an intrusion of a qualitatively different nature than the temporary intrusion effected by tradesmen and business visitors." Id. Obviously, permitting a tenant to insist that a landlord allow the tenant to install or retain the cable wiring and equipment in the common areas is equally intrusive and impermissible. Therefore, tenants are in no different position than cable operators when it comes to this issue, and thus the holding in Loretto is equally applicable here.

The correctness of Woolley cannot be questioned. If tenants had the right under common law to force property owners to submit to the cable service of their choice (and thus the accompanying installation), Congress never would have debated the issue of mandatory access nor would certain states have enacted mandatory access laws nor would the Commission be asking for comments with respect to the appropriateness of mandatory access. There would have been no need to engage in such Congressional debate, state legislation, or rulemakings because mandatory access would have been a given. The reason that mandatory access is not a given is because tenants do not have the right under common law to dictate to property owners that the building be wired by the cable provider of their choice. That is, tenants do not have the right as an appurtenance to their lease to insist that cable wiring be installed or retained in the common areas of an MDU. Therefore, ICTA respectfully submits that if the Commission sought to prescribe the Tenant Ownership Scenario, it would be exacting a taking of the property owners' property.

The fact of the matter is that property owners unquestionably own the common areas in an MDU. The tenant no more has an ownership interest in these areas than does the cable company.[7] While tenants generally are permitted, and indeed expected, to use the common areas on a nonexclusive basis in their intended manner (e.g., ingress, egress, washing in the laundry room, exercise in the fitness room, etc.) these rights of use do not include the right of permanent physical occupation of such areas. The law is clear that the landlord retains control over the common areas of the property. The tenant cannot determine what property or equipment will be installed or affixed in the common areas over the property owner's objections.

For example, a tenant may not forcibly install a television antenna on the roof of the property over the property owner's objection. See, e.g., Kaplan v. Sessler, 96 N.Y.S.2d 288 (N.Y. App. Term. 1950) (tenant's maintenance of television antenna on roof is intrusion or squatting on the property owner's property); Leona Bldg. Corp. v. Rice, 94 N.Y.S.2d 390 (N.Y. App. Term. 1949) (same); Scroll Realty Corp. v. Mandell, 92 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949). Nor may a commercial tenant operating a tavern construct a television antenna on a portion of a common yard behind the building containing

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[7] Indeed, a tenant's lease does not even confer any title ownership over any items within its individual dwelling unit. The lease only authorizes a tenant to occupy the space.

the leased premises. Bellomo v. Bisanzio, 60 A.2d 64 (N.J. Ch. 1948). Numerous other situations can be envisaged where a tenant might desire a particular amenity, but cannot seize the property owner's property in order to have it. For example, a tenant may not insist upon hanging particular works of art in the common hallway or claim a specific area of the property for one's own private parking purposes. MDUs simply would not function if the law were otherwise, since taken to its logical conclusion, a tenant could insist upon installing a swimming pool, tennis court or even a driving range. See Loretto, 458 U.S. at 436.

Further, the landlord will undoubtedly remain liable for the maintenance of such facilities. The responsibility for similar systems has been found to rest with the property owner. Property owners have been held accountable for the entirety of the sprinkler system, Payless Discount Centers, Inc. v. 25-29 North Broadway Corp., 443 N.Y.S.2d 21, 23 (N.Y. App. Div. 1981), the heating system, Thompson v. Paseo Manor South, 331 S.W.2d 1, 3-4 (Mo. Ct. App. 1959), and the electrical system, Leavitt v. Glick Realty Corp., 285 N.E.2d 786, 789 (Mass. 1972).[8/] Potential liability on the part of the property owner necessitates control of the wiring in order to maintain the facilities in accordance with the duty imposed on the property owner under tort law. Indeed, even if the tenant were given the opportunity to purchase the wire and associated equipment in the common area, the property owner would not be relieved of potential liability from, for example, a third party injured by the wiring or

[8/] Further examples of common areas found to be within the property owner's responsibility and control include a laundry room maintained for the use of all tenants, Grynbaum v. Metropolitan Life Ins. Co., 70 N.Y.S.2d 534 (N.Y. App. Div. 1947), and a stairway, Kirchhoff v. Murray, 35 Del. Co. 293 (Pa. Com. Pl. 1947) ("Where a building is leased to various tenants, in the absence of any agreement to the contrary, the landlord retains control of such common portions of the premises as the roof, hallways, steps, stairs, plumbing, and drains . . . .") (quoting Thompson on Real Property, Vol. IV, p. 88).

equipment. See Scroll Realty, 92 N.Y.S.2d at 814 (landlord able to prevent installation by tenant of television antenna on roof, in part because of potential liability it would impose upon the landlord).

Even further proof that the landlord controls the common area, and that to grant the tenant a permanent interest in it would effect a taking, is that unless the lease states otherwise, a tenant may not prevent a landlord from modifying the common areas as desired. For example, in constructing a 26-story addition to an MDU, a property owner could utilize a portion of the landing in the stairwell to install elevator service to the addition, notwithstanding the objections of the lessee of the entire floor on which the landing was located. Wilfred Labs. v. Fifty-Second St. Hotel Assocs., 519 N.Y.S.2d 220, 223 (N.Y. App. Div. 1987); see also Schrager's Drugs, Inc. v. Lawrence Park Shopping Center, Inc., 48 Del. Co. 422 (Pa. Del. C. 1961).

Finally, if the tenant were able to own the cable home wiring in the common areas, the transformation of the relative property rights of the tenant and the property owner that such a scenario would effect is itself a taking. As the court in Bellomo, 60 A.2d at 65-66, found, if the tenant were to construct and maintain a structure in the yard to support a television antenna, a portion of the yard would be appropriated for that tenant's exclusive use. But the tenant did not have that right since it never procured a private easement from the property owner. Id. Usurping ownership from the property owners by forcibly granting tenants easements through common areas for cable wiring would change "the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land." Hall v. Santa Barbara, 833 F.2d 1270, 1279 (9th Cir. 1986).[9] Such action is clearly a taking.

Accordingly, ICTA believes that granting tenants the right to purchase the cable wiring in the common area is a taking of the property owner's property.[10] ICTA further believes that the Commission cannot constitutionally exact such a taking because an entity can only compel a taking where it inherently has, or has been given, the eminent domain power to do so. See Section II.A.2. below. The Commission does not inherently have the power of eminent domain (see Section II.A.2. below) and Congress has not given the Commission the power of eminent domain in this instance. As established above, Congress only granted the Commission the power to control the disposition of cable within the subscriber's premises. If the subscriber is the property owner, Congress has not given the Commission the power to enforce a taking by the tenant anywhere. Moreover, even if the subscriber is the tenant, Congress has not given the Commission the power to permit the tenant to take property in the common areas, which certainly is not a part of the tenant's premises. ICTA

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[9] In Hall, a rent control ordinance prevented the owner of the land in a mobile home park from increasing the rent for the use of its land. The tenants at the mobile home park, who owned their own homes but rented the land on which the homes were situated, were able to receive above market value for the sale of their homes because the purchasers knew that they would pay below market value for the lease of the land. Id. The mobile home park owner argued that the ordinance constituted a taking, and the Ninth Circuit agreed, finding that the ordinance drastically affected the economic realities of the landlord tenant relationship. Id. at 1279. The Hall Court concluded that the fact that the taking was done by the tenant rather than the state was immaterial, quoting Loretto: "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." Id. at 1277 (quoting Loretto, 458 U.S. at 433, n.9).

[10] ICTA respectfully submits that this conclusion would not change even if ownership were not vested in the tenant but only a right to control the user of the wire. Whether the wire is owned by the property owner or a third party provider, the ability of a tenant to dictate a use of that wire different than the use to which the owner of the wire wishes to dedicate it is a forced physical occupation of the wire itself, i.e., a taking.

respectfully submits that such a taking is also unconstitutional because there is no provision for the property owner to receive compensation for the taking.

2. ICTA Believes That The Current Cable Demarcation Point For MDUs Leads To Impractical, Anticompetitive Results That Are Inconsistent With Congress's Expressed Intent

A cable provider uses two wiring components to service an MDU: common wire and wire dedicated to individual rental units (separate wire). Common wire ordinarily runs to the junction box in each building at which point it is connected to the multitude of separate wires that run continuously to and within the individual rental units. For two reasons, the home run wiring rules do not cover, and ICTA is not suggesting that such rules should, the common wiring even though such rules cover a portion of the separate wire (that portion within a tenant unit up to 12 inches outside that unit). First, on properties where there is more than one provider, each will need to install its own common wiring since different tenants will be receiving different providers' services. Conversely, each cable provider will not need to install its own separate wiring because any individual tenant will only be receiving one company's cable service.[11/] Second, it is much easier and less expensive for both the property owner and the new provider, and much less intrusive on the property owner who is replacing an existing provider (or adding a second provider), to have the new provider install its own common wire than it is to install its own separate wire to each rental unit.

While it is appropriate for the home wiring rules to cover only separate wiring, ICTA believes that the manner in which they do so for cable service to MDUs is inappropriate. The 12 inch rule provides that the demarcation point for cable service to MDUs is twelve inches outside of where the

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[11/] See Section I.A.4. infra regarding dual use of wiring for the provision of voice, video and data.

cable wire enters the rental unit. Thus, after termination of the cable provider's service, the separate wire can only be purchased up to 12 inches outside of the rental unit. ICTA firmly believes that this leads to impractical, anticompetitive results that are inconsistent with Congress's expressed intent. Instead, moving the demarcation point back to the point where the wire is dedicated to individual rental units (in conjunction with permitting the property owners to purchase the wiring upon termination) is practical, promotes competition, and is consistent with Congress's intent.

The 12 inch rule is impractical because to receive service in a rental unit there must be a separate wire that carries the signal from the junction box continuously to that rental unit. For virtually all units in most buildings the distance from the rental unit to the junction box will greatly exceed twelve inches. Therefore, purchasing only the portion of the separate wire in the rental unit and the first twelve inches outside the unit provides the purchaser with no benefit whatsoever because the unit cannot receive service unless the wire in the rental unit runs to the junction box. Therefore, the purchaser will still need to purchase from the new cable provider the separate wire that will run from the junction box to the rental unit. In short, under the 12 inch rule, the purchaser has no incentive to purchase the wiring, which it cannot use and which is worthless to it.

ICTA also believes that the 12 inch rule is inconsistent with Congress's expressed intent when enacting Section 16(d). The legislative history of that provision explicitly establishes that one of the primary purposes behind the provision was to prevent the purchaser of the wiring from being saddled with the "cost and inconvenience of having new wiring installed" when it decides to switch providers. Legis. Hist. at 1156. By applying the 12 inch rule, the Commission would in essence be forcing providers to overbuild home wiring at great expense, inconvenience and disruption to both tenants and property owners. The 12 inch rule is also inconsistent with the other purpose behind

Section 16(d): to prevent damage to the property from the removal of the wiring after termination of the provider's service. Id. The 12 inch rule does not prevent the provider from removing all of the separate wiring except for that portion in the rental units or twelve inches from those units. Thus, under the 12 inch rule, the provider will still be able to remove most of the separate wiring, a good portion of which will be behind walls. Damage to the property will certainly ensue from this removal, in contravention of Congress's expressed intent.

ICTA further believes that the 12 inch rule encourages anticompetitive conduct. Under the current rule, competitors to franchised cable operators are essentially precluded from competing with, or replacing, franchised cable operators at MDUs. Virtually all property owners refuse to allow installation of a second set of separate cable wires throughout their buildings because such construction entails risk of damage to the property and raises significant aesthetic concerns. Postwiring a building generally negatively impacts the appearance of the property because it cannot be hidden without tampering with the structure of the building. This leaves the property owner with the unenviable choice of tearing up his building to hide the post wire or leaving it exposed and having it reduce the attraction of the building. That reduced attractiveness from retrofitting the building in turn affects occupancy rates since potential renters will be more likely to rent elsewhere which obviously directly impacts on rental income and property values.

Accordingly, property owners routinely insist that a competitor to the incumbent franchised cable operator may only service the property (whether in addition to, or in replacement of, the franchised operator) if the competitor uses the separate wiring currently running throughout the building. The separate wiring ordinarily was installed many years earlier by the franchised cable operator, who has already more than fully recouped its investment on the wiring and who would